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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANEUDAE WATSON, Defendant and Appellant.	C057722 (Super. Ct. No. 04F08302)

Defendant Aneudae Watson was charged with four counts of aggravated sexual assault of a child, oral copulation (Pen. Code, § 269, subd. (a)(4) (counts one through four; undesignated statutory references are to the Penal Code), five counts of forcible lewd acts with a child under age 14 (§ 288, subd. (b)(1) (counts five through nine)), and possession of cocaine (Health & Saf. Code, § 11350, subd. (a) (count ten)). He pled no contest to possession of cocaine. The jury convicted him of forcible lewd acts in count five and the lesser included offense of lewd act on a child (§ 288, subd. (a)) in count six while

acquitting him on all the remaining counts. The court sentenced defendant to 16 years eight months in prison.[1]

On appeal, defendant contends: 1) expert DNA testimony violated his Sixth Amendment right to confrontation; 2) excluding evidence of prior complaints from the victim violated his rights to confrontation and due process; 3) his prior conviction for unlawful sexual intercourse with a minor (§ 261.5, subd. (d)) was improperly admitted; and 4) the court committed prejudicial error in refusing his requested pinpoint instruction on DNA evidence. We shall order a correction to the abstract and affirm.

BACKGROUND

G.S. was born in December 1990. She was living with her grandparents at the time of the trial, but had previously lived with her mother, defendant's girlfriend.

G.S. testified that while she was living with her mother in September 2004, she was sexually assaulted by defendant in three incidents taking place over the course of one night. G.S. went to bed around 9:00 p.m. and propped a metal scooter against her bedroom door. It took G.S. some time to fall asleep because she heard defendant and her mother having sex. At around midnight, she was awakened by the scooter falling down; G.S. asked if it was her mother, but she felt defendant come close and hold her arms down.

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[1] The court also imposed a consecutive eight-month term for a probation violation in an unrelated case.

Defendant, hovering over G.S.'s body, removed G.S.'s blankets and tried to pull his penis out of his pants. G.S. told him to get off, but defendant rolled up her T-shirt, tried to pull down her panties, and forced his penis into her mouth, while telling G.S. to orally copulate him. After a few minutes, defendant forced her legs open and attempted intercourse with G.S., who tried to resist. G.S. felt a sharp pain every time defendant tried to penetrate her. She believed defendant also licked her nipples and tried to perform oral copulation on her before the attempted intercourse. Defendant eventually got up, dressed, and walked out as if nothing happened. The incident lasted about 30 minutes.

Defendant returned five to 10 minutes later. He took G.S.'s clothes off, held her arms down, and attempted intercourse. G.S. kept telling defendant to stop, but he said nothing and continued. She again felt a sharp pain as he attempted intercourse; she believed defendant also orally copulated her and had her orally copulate him. After a few minutes of attempting penetration, defendant got off G.S., dressed, and left.

Defendant returned for the third and last incident 10 to 15 minutes later. He entered G.S.'s room holding a cup of water and her mother's "long, big, pink" sex toy. Defendant put them on the floor and tried to penetrate G.S. again. Unsuccessful, defendant got dressed, took the toy and water, and left.

When G.S. woke up in the morning, she felt "really dirty" and took a shower, scrubbing herself harder than usual. Later

that morning, her mother asked if she was all right, but G.S. said nothing because her mother did not intervene during the assaults.

Returning home from school, G.S. found defendant and her mother outside, fixing her mother's car. She went inside and watched television in the living room. Defendant came in and sat next to G.S., where he said something like "let me get some more," while trying to fondle her. G.S. said no, and defendant walked outside to work on the car.

Once defendant and her mother left, G.S. called her grandmother and said defendant had raped her. The grandmother told G.S. to call the police, so she called 911. A tape of the 911 call was played to the jury. G.S. told her mother about the sexual assaults after she returned.

G.S. remembered telling the police about the incident. She did not know why she told the police and the 911 operator that defendant came into her room two times.

G.S. admitted to making false allegations to a Children's Protective Services (CPS) worker that her stepfather, Michael C., mother's ex-husband, had molested her. She made these false allegations because G.S. wanted to get away from her mother and stepfather and live with her grandparents, who were in a custody dispute with G.S.'s mother at the time. CPS workers gave her the opportunity to recant, but she stuck with her lie for about four months.

G.S. also testified that when she was six or seven, a 12- or 13-year-old boy sexually assaulted her. The parties

stipulated that in 1998, a 12-year-old boy admitted committing sexual offenses against G.S. when she was seven.

G.S. denied that she is falsely accusing defendant of molesting her so that she may live with her grandparents. At the time of the incident, the courts had settled the custody dispute and forced G.S. to live with her mother, even though she wanted to live with her grandmother.

On September 21, 2004, at around 3:30 p.m., an Elk Grove police officer was dispatched to G.S.'s home for a sex crime report. G.S. told the officer defendant came to her room two times during the night of the 20th and the morning of the 21st. She said defendant orally copulated her and did not hurt her. After she came home from school, defendant tried to touch G.S.'s breasts and told her he would come back later on that night. G.S. never told the officer about a third visit or about defendant bringing a sex toy and glass of water into her bedroom.

G.S.'s sexual assault examination found an abrasion on part of her vagina which had occurred within the last 48 hours. It was considered evidence of acute genital trauma and was consistent with G.S.'s statement that she felt a sharp pain as defendant tried to penetrate her. The examiner could not say, however, what caused the injury.

Defendant was detained and advised of his rights. He told an officer the last time he was arrested for something like this, they found a single pubic hair of his. At jail, defendant would not let the nurse take a sample of pubic hair from him.

Over defendant's objection, the court admitted defendant's 2002 conviction for unlawful intercourse with a 16 year old.

Mary Hansen, the supervisor of the biology unit for the Sacramento County District Attorney's Office, testified regarding DNA testing done by another analyst, Devon Johnson, on the sexual assault kit and an identification kit taken from defendant. Johnson, who was trained and supervised by Hansen, was a qualified criminalist who had testified as an expert about seven times and had conducted approximately 100 DNA tests. Hansen was familiar with the work that was done, the notes prepared by Johnson at each stage, and with the ultimate report.

Hansen described the DNA analysis done for this case. After the sexual assault kit was screened for the presence of biological evidence, the case was assigned to Johnson for DNA analysis. Johnson analyzed vulvar, vestibular, and anal swabs from the victim's sexual assault kit, along with penile swabs from defendant's kit. She also used a blood sample from defendant to establish his DNA profile. The DNA analysis looked at 15 different STR (short tandem repeats) markers, plus a gender marker for determining whether the sample is from a male or female.

The People introduced a chart displaying the results Johnson obtained for the DNA tests on the biological evidence, which Hansen then explained to the jury. Sperm was found in the vulvar and vestibular swabs. Hansen described how Johnson developed a male profile for the vulvar and vestibular swabs,

which was compared to defendant's reference sample to see if they were the same at each location.

After G.S.'s DNA was removed from the sperm sample, the remaining male DNA matched defendant's reference sample on all 15 markers. Johnson calculated the possibility of a random sample matching the reference sample in this manner and determined it would happen in one in eight sextillion of the African-American population, one in 95 sextillion of the Caucasian population, and one in 56 septillion of the Hispanic population. The results for the penile swab from defendant showed that defendant was the contributor of the male DNA, while the female DNA in the swab belonged to G.S.'s mother.

Johnson's work in this case was subjected to a technical review by Hansen. A technical review entails looking at the analyst's notes, verifying that the documentation supports the analyst's conclusions, and that the data supports those conclusions.

The defense extensively cross-examined Hansen on the testing process employed in this case. Hansen admitted catching and correcting an error in Johnson's report. Since she did not personally observe the testing, Hansen could only testify to what Johnson was trained to do as opposed to what she actually did in this case. Hansen admitted it would be unusual for an analyst to change lab coats between testing different samples, and that it would be possible for DNA from one sample to contaminate another sample through a lab coat. She also did not know if Johnson wore a face mask during testing.

At the time of the testing in this case, Johnson had completed only about 20 DNA tests and may never have testified in court. Hansen did not know if Johnson had in fact cleaned the work area between each stage, used fresh paper, or bleached the desk between each testing. All of the samples would have been around the work space at the same time when the analyst was testing and the process employed would have copied any contamination from the sample to the test result.

Standard practice is to minimize contamination by handling different samples at different times or in different places. Hansen could not say whether Johnson worked on two samples at the same time, although Johnson's notes showed that samples were handled at different places at the same time. Hansen admitted that contamination between samples is possible, and she did not know if Johnson in fact employed the standard procedures for minimizing that risk. However, there is no evidence she violated protocol, and an examination of the data led Hansen to conclude there was no evidence of contamination.

Another way to check the quality of the testing is to review the notes and compare the quantity of sperm the analyst saw with the actual quantity of sperm obtained. Hansen compared the two and found Johnson made a good estimation. Hansen said that while it is possible for G.S. to come in contact with defendant's sperm by playing with her mother's sex toy, this was highly unlikely as the mother's DNA was not found in the samples from the sexual assault kit. Hansen concluded by stating that

based on her 22 years as a criminalist, she saw no evidence of contamination.

A CPS social worker testified as a defense witness. She related a report stating G.S. accused a babysitter of kicking her in the back but that G.S. embellished the story when telling law enforcement.

G.S.'s mother also testified for the defense. Defendant came to her house on the night of the incident and they had unprotected sex on the living room couch between 10:45 p.m. and midnight. She left twice while he was there, at around midnight for 10 to 15 minutes, and briefly at around 3:00 a.m. She would have heard defendant had he entered G.S.'s room, but admitted using methamphetamine around the time of the incident.

The mother had a conversation with defendant on September 21, after G.S. got home from school. Defendant commented that G.S. had "a real nice body for a 13 year old. She's stacked[.]" The mother told defendant to change the subject as he "sounded like a pervert."

DISCUSSION

I

At the in limine hearing, the People informed the court that Devon Johnson, the analyst who conducted the DNA test, would be at a previously scheduled DNA conference during the dates set for trial. Johnson's supervisor, Mary Hansen, would testify if Johnson was unavailable. Defense counsel replied this would put both parties at a disadvantage "because you get a lot of, I don't know, it's not in the record kind of answers."

Counsel asked for a continuance so that the defense could study recently received CPS records. The court denied the motion and Hansen testified regarding the DNA testing without objection.

After defendant filed his opening brief, the United States Supreme Court subsequently issued its opinion in *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [174 L.Ed.2d 314] (*Melendez-Diaz*), holding that a certificate of analysis, showing the nature and weight of a controlled substance recovered from the defendant, was indistinguishable from a sworn affidavit and fell within the "'core class of testimonial statements,'" and, thus, was subject to the confrontation clause requirements of *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). (*Melendez-Diaz, supra*, at p. ___ [174 L.Ed.2d at p. 321]; see also *id.* at pp. 320-322].)

We granted defendant's request for supplemental briefing on *Melendez-Diaz*, and he contends that the failure to call the analyst who conducted the DNA test violated his right to confrontation as set forth in *Melendez-Diaz* and *Crawford*. We disagree, as the claim is forfeited on appeal.

A.

Crawford held that out-of-court testimonial statements are barred by the Sixth Amendment's confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at p. 59 [158 L.Ed.2d at p. 197].) *Crawford* did not define the term "testimonial," but gave examples -- (1) "ex parte testimony at a preliminary hearing," (2) "[s]tatements

taken by police officers in the course of interrogations," (3) grand jury testimony, and (4) prior trial testimony. (*Id.* at pp. 51–52, 68 [158 L.Ed.2d at pp. 193, 203].)

In *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224] (*Davis*), the United States Supreme Court considered "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." (*Id.* at p. 817 [165 L.Ed.2d at p. 234].) *Davis* held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822 [165 L.Ed.2d at p. 237].)

The California Supreme Court addressed DNA testing under *Crawford* in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). In *Geier*, over the defendant's objection, the DNA expert for the prosecution, Dr. Robin Cotton, opined that a sample taken from a rape victim matched the DNA profile of the defendant. (*Id.* at pp. 593, 596.) Cotton was the laboratory director for a private company that performed DNA testing for both the prosecution and the defense; rather than performing the tests himself, he

oversaw testing and supervised the six analysts who conducted the actual testing. (*Id.* at pp. 594-595 & fn. 11.)

The defendant argued on appeal that Cotton's testimony violated his constitutional right under the Sixth Amendment. (*Geier, supra*, 41 Cal.4th at p. 596.) He argued that the DNA report upon which Dr. Cotton relied was testimonial under *Crawford* because the report was made with the reasonable expectation that it would later be used at trial. (*Id.* at p. 598.) The California Supreme Court disagreed. It found that under *Davis* "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made." (*Id.* at p. 607.) Since the analyst recorded her findings as they came in, the DNA report was, like the 911 call in *Davis*, not testimonial. (*Id.* at pp. 605-606.)

B.

Defendant argues that under *Melendez-Diaz* he was entitled to confront the DNA analyst who conducted the test, Johnson, at trial. The Attorney General contends that defendant has forfeited his claim on appeal and that we are still bound to follow *Geier*. Defendant asserts the claim is not forfeited because the trial court was compelled to admit the DNA testimony pursuant to *Geier*, rendering any objection futile.

It is a well established rule in this state that a criminal defendant's right to raise an issue on appeal is forfeited by the failure to have made a timely objection in the trial court. (*In re Seaton* (2004) 34 Cal.4th 193, 198; *People v. Barnum*

(2003) 29 Cal.4th 1210, 1224.) This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. (*In re Seaton, supra*, 34 Cal.4th at p. 198; *People v. Barnum, supra,* 29 Cal.4th at p. 1224.) However, "[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

The *Geier* opinion recognized that there was a split of opinion among the state and federal circuit courts over whether forensic reports were testimonial under *Crawford*, an issue the United States Supreme Court had not yet decided. (*Geier, supra,* 41 Cal.4th at pp. 598-603.) The confrontation clause issue in *Geier*, and the split in the courts on this point, was a matter which could be settled only by the United States Supreme Court.

Raising a federal constitutional objection in spite of California Supreme Court precedent to the contrary is not unusual. California courts are familiar with criminal defendants objecting to the application of a California Supreme Court decision on a federal constitutional question in order to preserve the issue for federal review. (See, e.g., *People v. Schmeck* (2005) 37 Cal.4th 240, 304 [objections to the constitutionality of California's death penalty procedure repeatedly rejected by the California Supreme Court]; *People v. James* (2009) 174 Cal.App.4th 662, 667, fn. 4 [objection seeking incorporation of the Second Amendment right to bear arms in

spite of California and United States Supreme Court opinions to the contrary].)

"Though evidentiary challenges are usually [forfeited] unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The split in the state and lower federal courts over whether forensic reports are testimonial under *Crawford* leads us to conclude that *Melendez-Diaz* was not so unforeseeable as to excuse defendant from failing to raise a confrontation clause objection to Hansen's testimony.

Defendant's failure to raise a Sixth Amendment objection at trial was not mere oversight. While he argued for a continuance which would have allowed Johnson to testify, it was to give the defense an opportunity to review CPS records. Counsel's remark that *both* sides would be disadvantaged if Johnson did not testify demonstrates he had tactical reasons for not pressing a confrontation clause objection.

Defendant did not present competing expert testimony or seek additional testing of the samples. Instead, he sought to raise doubt about whether the samples tested for DNA were contaminated. For example, defense counsel repeatedly elicited from Hansen that she could not personally verify whether Johnson followed the proper procedures, and counsel's closing argument devoted considerable time to addressing the possibility of contaminated DNA samples. In support of that argument, counsel

stated: "Ms. Hansen came in and testified what Devon Johnson did, but she doesn't know what she did. [¶] She knows what she's trained to do, supposed to do, but she doesn't know what she actually did." Allowing Hansen to testify about the DNA tests conducted by Johnson opened the DNA evidence to this attack from the defense.

"The defendant *always* has the burden of raising his Confrontation Clause objection . . . ." (*Melendez-Diaz, supra*, ___ U.S. at p. ___ [174 L.Ed.2d at p. 331].) Since the United States Supreme Court had not yet resolved this issue at the time of the trial, and defendant expressly identified tactical reasons for not raising an objection, we conclude that defendant's failure to object to Hansen's testimony forfeits his confrontation clause claim.

II

Defendant contends it was an abuse of discretion and a violation of due process and his Sixth Amendment right to confrontation to prevent defense counsel from questioning G.S. about earlier allegations of molestation. We disagree.

A.

During cross-examination, G.S. stated she had been molested twice, by defendant and by a teenage boy when she was six or seven. Defense counsel then asked G.S. if she had falsely told her grandmother that she had been sexually assaulted by a different boy. G.S. replied, "I don't remember that." Asked if she remembered telling her grandmother she had "been penetrated by a different boy than in the investigation," G.S. answered,

"No, I don't." G.S. did not remember telling her grandmother that "another person, another boy had touched you near your privates and tried to get on top of you." Asked if she said "that he tried touching your butt, got on top of you, that you pushed him off," G.S. said, "No."

G.S. did not remember telling her grandmother in 1999 that she had been taken somewhere by her mother and placed on a bale of hay while a teenage boy had sex with her. Asked if any of these alleged incidents were true, G.S. replied the bale of hay incident sounded familiar, but she did not think "it was actually like rape, or a kiss. I think that's kind of where she stretched the truth." Defense counsel asked G.S. if she remembered telling her grandmother about being put on a bale of hay by a teenage boy and being penetrated by him, and she replied, "No."

The court next conducted an off-the-record sidebar conversation with counsel. The court later explained the sidebar discussion for the record, stating it was concerned that counsel was questioning G.S. about other instances of sexual conduct without first notifying the court or filing a motion pursuant to Evidence Code section 782.

Defense counsel agreed, but asserted a good faith basis for the questions based on G.S.'s grandmother telling CPS and court investigators that G.S. was sexually assaulted by other individuals. Counsel read from a CPS report, reiterating the details of the penetration by a teenage boy on a bale of hay and

another incident where a younger boy got on top of her and started touching G.S.

The court indicated this line of questioning should be excluded under Evidence Code section 352. Defense counsel responded that the prior accusations were relevant whether or not they were true but agreed with the court that they were much more relevant if false. The court stated they did not know if the allegations were false and counsel asked for an Evidence Code section 402 hearing on the matter. The court asked counsel for evidence elaborating on the claim, and counsel submitted a copy of a document from the Sacramento County Department of Health and Human Services.

The court read the documents, finding they contained at least "double hearsay." According to the report, the grandmother told a social worker that G.S. had told her about another incident, which was not investigated, in which she had been penetrated several times. The grandmother also said that G.S. told her about being put on a bale of hay by a teenage boy and penetrated. The court found the documents provided no basis for concluding with any certainty that the allegations were false and made a "tentative ruling" that the defense could not cross-examine G.S. about these allegations.

The defense subsequently filed a motion to allow cross-examination on the new allegations. The court indicated that defendant's motion was based on statements made by the grandmother to an investigator during "extremely heated and highly contentious custody proceedings" in which she was trying

to get custody of G.S. The court did not know if the allegations were false or whether G.S. even remembered the alleged incidents. It excluded further cross-examination on the allegations under Evidence Code section 352, as litigating the truth of the allegations would take too long, the questioning would compromise G.S.'s privacy, the risk of prejudice and confusion were substantial, and these considerations substantially outweighed the probative value of the questioning.

B.

Defendant argues the court abused its discretion by excluding any further questioning under Evidence Code section 352. Characterizing the evidence as false allegations of sexual misconduct, he argues it was highly relevant to prove a pattern of false accusations by G.S., and was admissible as character evidence under Evidence Code section 1103. Defendant claims his offer of proof at trial was sufficient to warrant an Evidence Code section 402 hearing to address any questions the court had about the allegations. He asserts the evidence was not prejudicial or confusing, and determining the truth of the claims would not have consumed too much time. The court's failure to allow further cross-examination on the allegations was, defendant contends, a violation of his Sixth Amendment right to confrontation and due process right to present evidence.

A false complaint of molestation is relevant to the victim's credibility. However, the prior complaint is not relevant unless it is proved to be false. (*People v. Tidwell*

(2008) 163 Cal.App.4th 1447, 1457-1458 (*Tidwell*).) A trial court's exercise of discretion under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defendant presented no evidence showing G.S. made additional false allegations. The second example of hearsay in defendant's offer of proof at best shows the grandmother, who was involved in a highly contentious custody battle over G.S., related such accusations to an investigator. However, there was no evidence that the allegations were false or that G.S. remembered making them. Unlike the properly admitted evidence of false accusation against her former stepfather, defendant's offer of proof did not indicate against whom the accusation was made, and presented no evidence that G.S. either recanted or stood by the alleged accusations.

The court was not required to interrupt the trial and hold an Evidence Code section 402 hearing to add substance to defendant's bare offer of proof. Evidence Code Section 402 is a procedure for the trial court to determine, outside the jury's presence, whether there is sufficient evidence to sustain a finding of a preliminary fact upon which the admission of other evidence depends. The decision to hold an Evidence Code section 402 hearing is within the court's discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.) Lacking any evidence the

allegations were false, the court was well within its discretion to reject defendant's request.[2]

Defendant's line of cross-examination was minimally relevant, involving two unproven assertions: 1) G.S. had made the other accusations of sexual misconduct in the report; and 2) those accusations were false. If defendant was allowed to contend that G.S. had made these allegedly false accusations, then the People could reasonably be expected to litigate whether the claims were false and whether G.S. had in fact made them. Litigating these allegations would consume time on ancillary matters and potentially confuse the jury. (*See Tidwell, supra*, 163 Cal.App.4th at p. 1458 [having parties prove before the jury whether a prior rape allegation was false would consume too much time].) The evidence was also cumulative, as the jury already had much stronger evidence that G.S. falsely accused her former stepfather of molesting her. The court was within its discretion to exclude the questioning under Evidence Code section 352.

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[2] Nor were the allegations in the report admissible as evidence of prior inconsistent statements. Testimony from G.S. indicates she either did not remember the incidents in the allegations or did not remember making such allegations to her grandmother. A genuine inability to remember making a prior statement precludes admitting allegedly prior inconsistent statements. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 418.) Her most specific testimony on this point -- that the bale of hay incident sounded familiar, but her grandmother stretched the truth as it did not involve "rape, or a kiss" -- indicates the grandmother may have fabricated the claims she related to the investigator. However, this testimony neither admits nor denies that G.S. related this accusation to her grandmother.

While it is true that Evidence Code section 352 must at times give way to defendant's rights to confrontation and present evidence, this is not such an occasion. Applying "the ordinary rules of evidence" normally does not violate a defendant's constitutional rights. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Excluding the essentially irrelevant, time consuming, confusing, and ultimately speculative line of questioning sought by defendant did not violate his rights to confrontation or present evidence.

III

Over defendant's objection, the court admitted evidence of his prior conviction for unlawful sexual intercourse with a minor (§ 261.5), 16-year-old I.M. Defendant contends this evidence was not relevant to prove propensity under Evidence Code section 1108, and its admission violated due process. He is mistaken.

Evidence of prior criminal conduct is generally inadmissible to show that the defendant has a propensity or disposition to commit those acts. (§ 1101, subd. (a).) However, the Legislature created exceptions to the general rule where the uncharged acts involve sexual offenses or domestic violence. (§§ 1108, 1109.) By its express language, section 1108 requires the court to engage in the weighing process under

Evidence Code section 352 before admitting propensity evidence. (§ 1108, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) In this weighing process, the court must consider factors such as relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of distracting or inflaming the jury. (*People v. Falsetta*, *supra*, at p. 917.) We review a challenge to admission of prior bad acts under Evidence Code section 352 for abuse of discretion and will reverse only if the trial court's ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Defendant argues the two offenses are not sufficiently close to one another to support an inference of propensity. He notes the prior offense was punishable as a misdemeanor or a felony, and seducing a 16 year old is "not the same as committing acts of child molestation in the home of one's girlfriend."

"Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding

irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.) "[T]he probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense." (*Ibid.*)

The uncharged offense was close in time to the current crimes, as it involved an incident in September 2001, three years before the charged incidents. The proof of the prior offense, a no contest plea, was completely separate from the charged crimes. Although the uncharged offense was less serious than the charged crimes, like the charged crimes, it involved unlawful sexual intercourse with a minor.

There is evidence that defendant thought G.S. looked older than her age, telling the girl's mother she had "a real nice body for a 13 year old. She's stacked[.]" Although there are differences between 13- and 16-year-old victims, the prior offense is evidence that defendant was sexually attracted to underage females and would act on the attraction. Viewed in the context of his statement to G.S.'s mother, defendant's prior conviction is relevant to show a propensity to satisfy his sexual desire towards the underage G.S.

The prior conviction was not prejudicial, as it involved a less inflammatory offense, and provided no detail beyond the bare facts of his conviction. Nor was it confusing to the jury, as it required no more than reciting the facts of the no contest plea, the relevant Penal Code section, and that it involved a 16

year old. It was not an abuse of discretion to admit this evidence.

We also reject defendant's due process claim, which simply reiterates his Evidence Code section 352 claim that the evidence has no probative value.

IV

Defendant's final contention is the court committed prejudicial error by refusing a requested pinpoint instruction on DNA evidence. We disagree.

Defendant requested the following instruction on DNA evidence:

"DNA evidence and testimony regarding DNA evidence has been received in this trial for the purpose of identifying defendant as the perpetrator of the crime charged. In determining the weight [of the] DNA evidence, consider the reliability of the evidence, as well as other factors which bear upon the accuracy of the DNA evidence, including but not limited to any of the following: [¶] The validity and reliability of the test methods used; [¶] The accuracy and reproducibility of the test results; [¶] The risk of contamination; [¶] The extent to which the defendant either fits or does not fit the genetic profile of the evidence; [¶] The validity and reliability of the database used to calculate the estimated frequency of a genetic profile; [¶] The risk of a false positive or false negative result based on the laboratory error; and [¶] Any other evidence relating to the DNA evidence and its ability to link or not to link the defendant to the charged crime."

The court rejected the proposed instruction as the other instructions, particularly those on expert evidence, sufficiently addressed how to consider DNA evidence. Defendant contends the court's refusal to give the requested pinpoint instruction violated his due process rights. We disagree.

The trial court is required to instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 and *People v. Breverman* (1998) 19 Cal.4th 142, 175-176.) The court has an additional obligation to give, on the defendant's request, a "pinpoint" instruction relating to particular elements of the charged crime or highlighting the focus of the defendant's case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) However, the court may properly refuse to give an instruction that merely elaborates on the general instructions already given. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

The jury was instructed with CALCRIM No. 332, which states in relevant part:

"Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training,

and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion you find unbelievable, unreasonable, or unsupported by the evidence."

The requested pinpoint instruction differed from the relevant CALCRIM instructions only by highlighting potential faults in the DNA evidence, a subject better left to argument and cross-examination than to a pinpoint instruction. CALCRIM No. 332, along with other instructions on evidence, CALCRIM Nos. 302[3] (evaluating conflicting evidence) and 226[4] (witnesses),

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[3] "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

[4] "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while

allowed the jury to consider whether the DNA evidence was reliable. Defendant was able to, and did argue that the DNA evidence was unreliable. Denying the requested pinpoint instruction was neither error nor prejudicial to defendant.

V

The Attorney General points out errors in the abstract. Defendant was sentenced as follows: an upper term of eight years for forcible lewd acts in count five; a consecutive eight-year term for a lewd act on a child in count six; and a consecutive eight-month term for possession of cocaine in count ten, for a total term of 16 years eight months, along with a consecutive eight-month term for a probation violation in an unrelated case. The court imposed consecutive sentences in

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testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] . . . [¶] Has the witness engaged in [other] conduct that reflects on his or her believability? [¶] . . . [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] . . . [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject."

counts five and six pursuant to section 667.6, subdivision (c), which allows for fully consecutive terms for certain sex offenses.

The abstract does not relate the consecutive eight-year term in count five, instead showing an eight-year enhancement pursuant to section 667.6, subdivision (c). The court shall prepare an amended abstract showing that defendant was sentenced to a consecutive eight-year term in count five.

DISPOSITION

The judgment is affirmed. The court is directed to prepare a corrected abstract of judgment reflecting that defendant was sentenced to a consecutive eight-year term for forcible lewd acts with a child under age 14 (§ 288, subd. (b)(1)) in count five and omitting the erroneous reference to an eight-year sentence enhancement pursuant to section 667.6, subdivision (c), and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

SIMS, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.